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Supreme Court, U.S.
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No. 1

In The
Supreme Court of the United States

W. RUSSELL DUKE, JR., AND NORTH CAROLINA RIGHT TO LIFE COMMITTEE FUND FOR INDEPENDENT EXPENDITURES, *Petitioners,*

v.

LARRY LEAKE, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Petition for a Writ of Certiorari

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Questions Presented

Decisions of this Court have established that the First Amendment protects both candidates and independent groups from limits on their political expenditures. North Carolina, like many other states, has adopted a public financing scheme for certain state elections that contains provisions that burden such speech by providing additional public funds to rescue publicly funded candidates from independent spending by citizens groups and from "excess" spending by privately funded opposing candidates and by imposing substantial unilateral reporting requirements on them. The Fourth Circuit below held that these rescue funds did not burden the free speech rights of independent spenders and privately funded opposing candidates, expressly rejecting the reasoning of the Eighth Circuit decision in *Day v. Holahan*. But this Court in *Davis v. FEC* endorsed the reasoning of *Day* and held that benefits to one candidate burdens the First Amendment rights of the other.

(1) Whether the rescue funds provisions of North Carolina's public financing scheme violate the First Amendment:

   (a) because the rescue funds unconstitutionally burden core political speech, and

   (b) because their disproportionate reporting requirements unconstitutionally burden core political speech.

Parties to the Proceedings

The following individuals and entities are parties to the proceedings in the court below:

W. Russell Duke, Jr., North Carolina Right to Life Committee Fund for Independent Expenditures, and North Carolina Right to Life State Political Action Committee,[1] *Plaintiffs-Appellants;*

Barbara Jackson, *Plaintiff* (she did not participate in the appeal of the district court decision to which she was a party);

Larry Leake, Lorraine G. Shinn, Charles Winfree, Genevieve C. Sims, Robert Cordle, Roy Cooper, C. Colon Willoughby, Jr., and Robert Stuart Albright, *Defendants-Appellees*;

James R. Ansley, and Common Cause North Carolina, *Intervenors-Defendants-Appellees*;

Keith M. Kapp; J. Michael Booe, David Benbow, David Yates Bingham, Gilbert W. Chichester, Renny W. Deese, Jim R. Funderburk, John E. Gehrig, Isaac Heard, Jr., Patricia L. Holland, Margaret Hunt, Margaret McCreary, David T. Phillips, Fred D. Poisson, Sr., Donald C. Prentiss, Richard Roose, Jan H. Samet, and Judy D. Thompson, *Defendants* (they did not participate in the appeal of the district court's decision to which they were a party).

Corporate Disclosure Statement

North Carolina Right to Life Committee Fund for Independent Expenditures has no parent corporation,

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[1] North Carolina Right to Life State Political Action Committee is not a party to this appeal.

and no publicly held company owns ten percent or more of its stock. Rule 29.6.

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Petition for a Writ of Certiorari

Petitioners Duke and North Carolina Right to Life Committee Fund for Independent Expenditures respectfully request a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fourth Circuit in this case.

Opinions Below

The order of the court of appeals affirming the district court is at 534 F.3d 427. App. 1a. The district court opinion is at 476 F. Supp. 2d 515. App. 24a.

Jurisdiction

The court of appeals upheld the district court's decision on May 1, 2008. App. 1a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitution, Statutes & Regulations Involved

U.S. Const. amend. I is in the Appendix at 55a.
N.C. Gen. Stat. § 163-278.6 is at 55a.
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N.C. Gen. Stat. § 163-278.67 is at 78a.

Statement of the Case

This case presents a constitutional challenge by W. Russell ("Rusty") Duke, a 2006 judicial candidate for the North Carolina Supreme Court, and North Carolina Right to Life Committee Fund for Independent Political Expenditures ("IEPAC") to the rescue provisions of North Carolina's public financing scheme, N.C. Gen. Stat. § 163-278.61 *et seq.*, because the scheme's rescue funds and related reporting requirements impose a substantial unconstitutional burden on the political speech of independent political spenders and privately funded candidates. *Id.* at §§ 164.-278.62–164.278.67.[2] These provisions chill Mr. Duke and IEPAC's ability to engage in protected political speech and are unconstitutional on their face and as applied to their expenditures.

I. The Statutory Scheme

In 2002, the North Carolina Legislature created a public financing scheme for judicial elections in North Carolina. *See* N.C. Gen. Stat. §§ 163-278.62 through 163-278.70, and § 163-278.13. Under this public funding scheme, judicial candidates who wish to

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[2]The case below also involved a challenge to North Carolina's 21-day pre-election contribution ban, found at N.C. Gen. Stat. § 163-278.13(e2)(3), brought by North Carolina Right to Life State Political Action Committee ("SPAC"). Because the North Carolina is in the final stages of adopting a bill repealing this provision, Duke and SPAC do not seek review of that provision. *See* Senate Bill 1263, Section 7(a), *available at* http://www.ncleg.net/Sessions/-2007/Bills/Senate/HTML/S1263v5.html. As a result, SPAC does not join this appeal.

receive funds must first "file with the North Carolina Board of Elections a declaration of intent to participate in the act as a candidate for a stated office," affirming that

> only one political committee, identified with its treasurer, shall handle all contributions, expenditures, and obligations for the participating candidate and that the candidate will comply with the contribution and expenditure limits set forth in subsection (d) of this section and all other requirements set forth in this Article or adopted by the Board.§ 163-278.64(a). Candidates are ineligible to participate in the fund if they have collected more than $10,000 in contributions or made expenditures in excess of $10,000 prior to filing the declaration of intent.

Id. at § 163-278.64(d)(1).

After the candidate has filed a declaration of intent, he becomes a "participating" candidate, and may apply to be certified to receive public funding. *Id.* at § 163-278.64(b). To be certified, a candidate must raise qualifying contributions, from at least 350 registered voters, that total between 30 and 60 times the filing fee, for the candidate's respective office. *Id.* at § 163-278.62(9), (10) & (18); § 163-278.64(b). Thus, in 2006, a candidate for Supreme Court would have needed to raise between $34,590 and $69,180, and a candidate for Court of Appeals would have needed to raise between $33,150 and $66,300. *Id.* at § 163-278.62(9), (10) & (18); § 163-278.64(b). When a participating candidate has received this level of support, he

can submit an itemized report of contributions to the Board. *Id.* at § 163-278.64(c)(2). The Board then certifies that the candidate has met the requirements of § 163-278.64(c).

The participating candidate, now a "certified" candidate, is then eligible to receive an initial distribution of government funds to her campaign, if she faces a contested general election campaign. *Id.* at § 163-278.65(b)(4). This government contribution to the candidate's campaign is "in an amount equal to 125 times the candidate's filing fee" for Court of Appeals races ($138,125 in 2006) and 175 times the candidate's filing fee for Supreme Court races ($201,775 in 2006). *Id.* § 163-278.65(b)(4).

Additional government contributions are available to a certified candidate if the combined sum of (a) expenditures by her noncertified opponent, (b) independent expenditures[3] made in support of that opponent, and (c) independent expenditures in opposition to the certified candidate exceeds a certain trigger amount.[4] *Id.* at § 163-278.67(a). These additional

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[3]An independent expenditure is defined as "an expenditure to support or oppose the nomination or election of one or more clearly identified candidates that is made without consultation or coordination with a candidate or agent of a candidate whose nomination or election the expenditure supports or whose opponent's nomination or election the expenditure opposes." *Id.* at § 163-278.6(9a).

[4]This trigger amount is equal to the maximum qualifying contribution sum in the case of a primary, and the amount of the initial distribution in the case of a general election. *Id.* at § 163-278.62(18).

government contributions, or "rescue funds," as they were originally described,[5] are made in an "amount equal to the reported excess." *Id.* at § 163-278.67(a). That is, for every dollar spent over the trigger amount by a noncertified opponent and by an independent group in support of the noncertified opponent or in opposition to the certified opposing candidate, the certified candidate receives a dollar of government contributions to her campaign. *Id.* at § 163-278.67(a). Rescue funds are "limited to . . . two times the amount described in G.S. § 163-278.65(b)(4)," either $132,600 (Court of Appeals) or $138,360 (Supreme Court) in a contested primary and either $276,250 (Court of Appeals) or $403,550 (Supreme Court) in a contested general election. *Id.* at § 163-278.67(c)&(d).

Importantly, independent expenditures in support of a certified candidate or in opposition to a non-certified candidate are not included when calculating the trigger amount, and no rescue funds are issued to noncertified candidates nor deducted from a certified candidate's government funding based on any independent expenditures made in support of a certified candidate. *Id.* at § 163-278.67(a).

In order for the Board of Elections to determine when the trigger amount has been reached, the North Carolina public financing scheme sets up a series of

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[5]The District Court decision described these funds as "rescue funds," *see* App. 27a, because the North Carolina law described them in this way. But the Court of Appeals described them as "matching funds" because North Carolina changed the statutory description of these funds when this case was on appeal. *See* App. 11a.

reporting requirements for noncertified candidates and citizens groups that are not imposed on certified candidates. *Id.* at § 163-278.66(a). Noncertified candidates with certified opponents are required to "report total income, expenses, and obligations to the Board by facsimile machine or electronically within 24 hours after the total amount of campaign expenditures or obligations made, or funds raised or borrowed, exceeds eighty percent (80%) of the trigger for rescue funds." *Id.*[6] Subsequently, noncertified candidates must follow an expedited reporting schedule, set by the Board, or, if such a schedule has not been set, must file additional reports "after receiving each additional amount in excess of one thousand dollars ($1,000) or after making or obligating to make each additional expenditure(s) in excess of one thousand dollars ($1,000)." *Id.*[7]

Likewise, "any entity making independent expenditures in support of or opposition to a certified candidate or in support of a candidate opposing a certified candidate" is required to "report the total funds received, spent, or obligated for those expenditures to the Board by facsimile machine or electronically within 24 hours

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[6]This reporting requirements are in the process of being amended to only require reporting of contributions. *See* Senate Bill 1263, Section 10.2(a), *supra* note 2.

[7]After this lawsuit was filed in the district court, the Board set an expedited reporting schedule for the 2006 election, requiring eight reports to be filed between August 22, and November 3, 2006. Senate Bill 1263, Section 10.2(a), *supra* note 2, will remove the $1,000 threshold requirement to leave expedited reporting requirements at the discretion of the Board.

after the total amount of expenditures or obligations made, or funds raised or borrowed, for the purpose of making the independent expenditures, exceeds five thousand dollars ($5,000)."[8] *Id.* Subsequently, such groups must follow the same expedited reporting schedule as noncertified candidates, filing additional reports. *Id.*

Under these reporting requirements, noncertified candidates could be required to file dozens of separate reports during the primary and general election campaign before the trigger amount has even been reached, and every day thereafter. *Id.* In contrast, a certified candidate need make only two reports—one during the certification process and one after the election. *Id.* Similarly, independent groups that support a noncertified candidate or oppose a certified candidate may be subject to substantial reporting during the campaign season, whereas independent groups opposing a noncertified candidate are never required to file any reports. *Id.*[9]

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[8]Section 163-278.66(a) originally required an entity making independent expenditures to report expenditures only if they both surpassed, in total, the threshold of $3,000 and were made after the candidate spent "fifty percent (50%) of the trigger for rescue funds"—usually near $100,000. N.C. Gen. Stat. § 163-278.66(a). Effective August 3, 2006, the statute was amended removing the 50% line and changing the threshold expenditure amount from $3000 to $5000.

[9]For reasons that are unclear, independent expenditures made in support of a certified candidate are subject to the reporting requirements, even though such expenditures

II. The Facts

W. Russell Duke is a judge in North Carolina Superior Court for Judicial District 3A. AC ¶ 19.[10] He ran for Supreme Court Justice in 2006 as a non-certified candidate facing a certified opponent and raised in excess of the trigger amount. AC ¶¶ 19, 24.

Judge Duke was required to report within 24 hours all expenditures and obligations he made throughout his campaign once the amount of his campaign expenditures exceeded 80% of the trigger amount, or $168,620 for the general election. § 163-278.66(a); Duke Aff. ¶ 4. North Carolina Right to Life Committee Fund for Independent Political Expenditures ("IEPAC") was subject to a similar provision which requires reporting of initial independent expenditures and obligations over $5000. § 163-278.66(a). Once this occurred, Judge Duke and IEPAC would have been required to follow an expedited reporting schedule. *Id.*

Judge Duke had to decide whether to limit his campaign expenditures so as not to exceed the trigger amount during his 2006 campaign—assuming no independent expenditures were made supporting him, which was beyond his control—or to suffer the penalty of triggering rescue funds for his certified opponent. Ultimately, Judge Duke made expenditures over the trigger amount, which resulted in rescue funds being

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do not affect the distribution of rescue funds. *Id.* rescue fundsat § 163-278.66(a).

[10]Plaintiffs' Amended Complaint for Declaratory and Injunctive Relief ("AC") was verified by Judge Duke, and by Barbara Holt, President of IEPAC.

provided to his opponent. AC ¶ 32.

Likewise, IEPAC intended to make independent expenditures in support of a noncertified candidate or in opposition to a certified candidate. AC ¶ 37. However, because IEPAC's expenditures would count towards the trigger amount and could result in government contributions being issued to candidates they opposed, IEPAC did not make independent expenditures in favor of any noncertified candidate. AC ¶ 37.

III. The History of the Litigation

On August 8, 2005, Duke and IEPAC filed suit in the Middle District of North Carolina (Cause No. 5:06-cv-00324) against the Board, the Districts Attorney of Wake and Guilford Counties, and the Attorney General, challenging North Carolina's rescue provisions under the First Amendment. An Amended Complaint was filed on September 7, 2005. The Board filed its Motion to Dismiss on November 14, 2005, and Intervenors filed their Motion to Dismiss, as well as their Motion to Intervene, on November 15, 2005.

On August 11, 2006, the case was transferred to the Eastern District of North Carolina. Duke and IEPAC then filed a Motion for Preliminary Injunction, which was denied on October 26, 2006. On March 30, 2007, the District Court entered final judgment granting the Board's and Intervenors' respective Motions to Dismiss.

Notice of appeal was filed on April 26, 2007. The court of appeals affirmed the district court in an opinion filed May 1, 2008.

Reasons for Granting the Petition

This case is at the forefront of a long raging judicial debate over the constitutionality of provisions of public financing schemes that award rescue funds to publicly funded candidates in order to fend off "excess" spending by privately funded opponents and independent spending opposing such publicly funded candidates.

These rescue funds provisions have resulted in extensive litigation focused on whether the rescue funds cause a cognizable First Amendment burden on privately funded candidate's speech and on independent spending or merely function as a benefit enjoyed by the publicly funded candidate. The Eighth Circuit determined that rescue funds were a cognizable First Amendment burden on independent spending in *Day v. Holahan*, 34 F.3d 1356, 1360 (8th Cir. 1994). Conversely, the First Circuit in *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000), perceived only a benefit for the publicly funded candidate. *Id.* at 466-72. The Fourth Circuit below, when faced with this precise issue in this litigation, rejected *Day* and agreed with *Daggett* in finding North Carolina's rescue funds and attendant reporting requirements constitutional. App. 15a.

This places the Fourth Circuit on the wrong side of the circuit split. In *Davis v. FEC*, 128 S. Ct. 2759 (2008),[11] this Court endorsed the rationale of *Day* to

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[11] *Davis* was handed down by this Court on June 26, 2008, after the Fourth Circuit's decision herein. While this appeal was pending in the Fourth Circuit, this Court took up *Davis* and Duke filed a Notice of Supplemental Author-

support its conclusion that Section 319(a) of BCRA burdened free speech:

> Many candidates who can afford to make large personal expenditures to support their campaigns may choose to do so despite § 319(a), but they must shoulder a special and potentially significant burden if they make that choice. *See Day v. Holahan*, 34 F.3d 1356, 1359-1360 (C.A.8 1994) (concluding that a Minnesota law that increased a candidate's expenditure limits and eligibility for public funds based on independent expenditures against her candidacy burdened the speech of those making the independent expenditures).

Davis, 128 S. Ct. at 2772. Thus, in rejecting the reasoning of *Day*, the Fourth Circuit was plainly wrong. As a result, this Court should either (1) grant certiorari, and summarily vacate the Fourth Circuit opinion and remand this case to be reconsidered in light of *Davis*, or (2) grant certiorari and decide this case on the merits.

I. This Case Involves a Matter of Great Public Importance Because North Carolina's Rescue Funds Provisions Are Just One of Many Across the Nation.

Public funding of candidate campaigns has long been advocated by some campaign finance reformers

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ity with the Fourth Circuit on January 16, 2008, noting the pendency of *Davis* in this Court and suggesting that the Fourth Circuit await this Court's decision in *Davis*. The Fourth Circuit declined to do so and issued it opinion before *Davis* was decided.

and has become a feature in a significant number of federal, state, and municipal jurisdictions. The Federal Election Campaign Act contains a public funding scheme for candidates for President,[12] and Congress is currently considering a proposal for public funding of congressional elections that contains provisions similar to the rescue funds and reporting requirements of the North Carolina scheme.[13] In addition, there are several States and localities that provide public funding for certain elections, including Arizona, Connecticut, Hawaii, Maine, New Jersey, Albuquerque, New Mexico, and Portland, Oregon.[14] Many of these schemes provide rescue funds and contain reporting requirements similar to those at issue in this case.[15]

Furthermore, in 2002, the American Bar Association specifically endorsed public funding for judicial

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[12]26 U.S.C. §§ 9001 to 9013. This federal scheme does not contain any provision for rescue funds.

[13]Fair Elections Now Act, S. 936, 110th Cong. § 511 (2007) (providing "fair fight" funds to participating candidates based on opposition spending.); *see also Id.* at § 103 (providing disproportionate reporting requirements for nonparticipating candidates).

[14]*See, e.g.*, Ariz. Rev. Stat. Ann. §§ 16-901.01, -940 to -961 (2006); Conn. Gen. Stat. §§9-333a to -333n, 9-700 to -751 (Supp. 2006); HI Stat.. § 11-217 et seq. (West 2008); Me. Rev. Stat. Ann. 21-A, §§ 1121-1128 (Supp. 2006); N.J.S.A. 19:44A-30 et seq. (2004).

[15] *See, e.g.* Ariz. Rev. Stat. Ann. §§ 16-941(B)(2), 16-952 (2006); Conn. Gen. Stat. §§ 9-712, 9-713, 9-714 (Supp. 2006); Me. Rev. Stat. Ann. 21-A, § 1017(3-B), 1125(9) (Supp. 2006); N.J.S.A. 19:44A-30 et seq. (2004).

elections, *see* American Bar Association Standing Committee on Judicial Independence, *Public Financing of Judicial Campaigns*, Feb. 2002,and public funding for at least some judicial races is in place in New Mexico and Wisconsin,[16] and many other states are currently considering public funding proposals.[17] Many of these public funding schemes are modeled on the North Carolina law and contain rescue funds and onerous disproportionate reporting requirements.[18]

Because a Circuit split exists as to whether rescue funds and the disproportionate reporting requirements that accompany such funds can be constitutionally employed in public financing schemes, *see infra*, legislators lack guidance on how to structure any such public funding scheme consistent with the First Amendment. And where such proposals have or will be adopted, privately funded candidates and independent groups may find their rights to freedom of speech and association impermissibly abridged.

II. The Fourth Circuit's Decision to Uphold North Carolina's Rescue Funds Conflicts With the Decisions of this Court and of Other Circuits.

A. The Rescue Funds Burden Core Political Speech.

North Carolina's rescue funds provide a publicly

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[16] *See* N.M. Stat. § 1-19A-13(I); Wis. Stat. Ann. § 11.001 et seq. (West 2004).

[17] *See, e.g.*, H.B. 251 (Id. 2003); H.B. 4610 (Ill. 2006); S.B. 171 (Wis. 2007).

[18] *See, e.g.*, N.M. Stat. § 1-19A-14.

funded candidate additional government funding in proportion to the "excess" expenditures made by her privately funded opponent, combined with any independent spending supporting her, when such expenditures exceed the publicly funded candidate's initial public funding disbursement. *Id.* at § 163-278.67(a).

In *Day*, 34 F.3d 1356, provisions of Minnesota's public funding scheme that afforded rescue funds for independent expenditures of third parties supporting the privately funded candidate was challenged. The Eighth Circuit found that these rescue funds burdened the First Amendment rights of groups making independent expenditures and struck down the scheme as a content-based burden that failed strict scrutiny. *Id.* at 1360-61. This Court in *Davis* specifically affirmed *Day*'s rationale that such a provision creates "a special and potentially significant burden." *Id.* at 2772.

The Fourth Circuit, however, rejected *Day*'s rationale and held that such a scheme did not burden Duke or IEPAC's free speech rights. App. 14a. It reasoned that the rescue funds provision did not amount to a cognizable First Amendment harm to Duke or IEPAC because the provision was not coercive. App. 16a. In so doing, the court below erred.

B. A Circuit Split Exists Regarding the Constitutionality of Rescue Funds.

Although this Court now endorsed *Day*'s rationale, other circuits have refused to follow it. To reach the conclusion that it did, the Fourth Circuit relied on a series of public financing cases that originated out of the First Circuit. App. 11a.

In *VoteChoice, Inc. v. DiStefano*, 4 F.3d 26 (1st Cir.

1993), the court reviewed Rhode Island's contribution "cap gap" that doubled the contributions a public-funding candidate could receive from a person or political action committee in a given year if triggered. *Id.* at 30. The court held that the cap gap was merely a part of Rhode Island's voluntary public funding scheme and that it did not burden speech because it neither penalized nor coerced candidates into participating in the public funding scheme. *Id.* at 39. The court disregarded the effect the provision had on privately funded opposing candidates, claiming that the "noncomplying candidate suffers no more than a countervailing denial" of a benefit and focusing instead on the "rough proportionality" of burdens and benefits on those who participate in the scheme. *Id.*

The First Circuit affirmed its *VoteChoice* rationale in *Daggett v. Comm'n on Governmental Ethics and Election Practices*, 205 F.3d 445 (1st Cir. 2000), upholding Maine's public-funding scheme. *Id.* at 472. The scheme provided rescue funds to publicly funded candidates (made possible by reporting requirements of independent expenditures in excess of $50) and reduced contribution limits for privately funded candidates to between $250 and $500, depending on the office sought. *Id.* at 451-52. The court dismissed any adverse affect on the privately funded candidate, noting that the scheme "in no way limits the quantity of speech . . . nor . . . threaten[s] censure or penalty," *id.* at 464, and, instead, also focused on the voluntary nature of the scheme. *Id.* at 466-67.

Daggett expressly refused to adopt the rationale of *Day*, instead looking to a subsequent Eighth Circuit decision which the First Circuit thought discredited

Day. *Daggett*, 205 F.3d at 464. In *Rosenthiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996), the court held that Minnesota's public funding scheme, with its $50 contribution refund to taxpayers giving to publicly funded, but not privately funded, candidates was not coercive and, thus, did not burden the First Amendment rights of the privately funded candidates. *Id.* at 1552-53. It distinguished *Day* on factual grounds and adopted the rationale of *VoteChoice*, contending that because the public funding scheme involved an exchange of voluntary restrictions for a benefit, it was not coercive. *Rosenthiel*. 101 F.3d at 1550-51.

Similarly, the Sixth Circuit in *Gable v. Patton*, 142 F.3d 940 (6th Cir. 1998), adopted *VoteChoice*'s rationale to uphold Kentucky's $2-for-$1 matching provision for publicly funded candidates because the court could not determine whether the scheme was clearly coercive. *Id.* at 948-49.

These decisions of the First, Sixth, and Eighth Circuits, along with that of the Fourth Circuit below, are in conflict with *Day*. This conflict warrants a grant of certiorari.

C. The Rescue Funds Provision Fails Strict Scrutiny.

The present case, when analyzed within the proper framework of *Davis* and *Day*, clearly involves significant burdens on speech. The rescue funds provision affords publicly funded candidates with additional funds if privately funded candidates like Duke or entities like IEPAC decide to make campaign expenditures that trigger the provision. This places privately funded candidates in the circumstance of choosing

either to exercise their free speech rights and trigger rescue funds for their publicly funded opponent or to forgo their speech to avoid such an outcome. Entities like IEPAC are likewise placed in the position of independently advocating for a privately funded candidate and ensuring additional funding for her publicly funded opponent or forgoing its speech to prevent triggering such funds. In the present case, IEPAC chose not to speak. AC 36. Duke initially chose not to speak, but later determined to speak despite the rescue funds provisions. Duke Aff. ¶ 4. Under *Davis* and *Day*, this amounts to a cognizable burden on Duke and IEPAC's speech rights and triggers First Amendment scrutiny.

Once a cognizable First Amendment burden has been established, the analysis continues under strict scrutiny. *Davis,* 128 S. Ct. at 2772. To survive such scrutiny, the rescue funds provision must be narrowly tailored to serve a compelling interest. *Id.*

The purpose of North Carolina's public financing scheme is to promote "fairness of democratic elections" and to minimize potential corruptive effects of "large amounts of money being raised and spent to influence the outcome of elections." N.C. Gen. Stat. § 163-278.61. As to promoting the "fairness of democratic elections," the "fairness" contemplated here is the fact that the rescue funds attempt to equalize the financial resources of the candidates involved. However, equalizing candidate spending is not a compelling governmental interest. *Davis*, 128 S. Ct. at 2773-74.[19]

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[19]Even if such an interest were compelling, the rescue funds provision does not serve this interest because it does

Regarding the purported purpose to minimize potential corruptive effects of "large amounts of money being raised and spent to influence the outcome of elections," this Court has already held that the way to limit the potential corruptive effect of raising contributions is contribution limits, *Randall v. Sorrell*, 548 U.S. 230, 242 (2006) ("the Government's primary justification for expenditure limitations, preventing corruption and its appearance, was adequately addressed by the Act's contribution limitations and disclosure requirements"), and that candidate and independent spending poses no threat of corruption. *Buckley v. Valeo*, 424 U.S. 1, 46 (1976) ("independent advocacy . . . does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions"); *see also id.* at 53 ("the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act's contribution limitations are directed."); *Randall*, 548 U.S. at 248 (striking down Vermont's expenditure limits). Public funding schemes generally pass rational basis scrutiny. *Buckley*, 424 U.S. at 91 ("Whether the chosen means [public funding of elections] appear 'bad,' 'unwise,' or 'unworkable' to us is irrelevant. Congress has concluded that the means are "necessary and proper" to promote the general welfare, and we thus decline to find this legislation without the

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not include in its calculations funds spent opposing a privately funded candidate. N.C. Gen. Stat. § 163-278.66(a). The rescue funds provision is thus underinclusive and does not serve any interest in equality.

grant of power in Art. I, s 8"); *Davis*, 128 S. Ct. 2772 ("Congress 'may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations') (*citing Buckley*, 424 U.S. at 57, n.65). But rescue funds are afforded to combat non-corrupting spending of privately funded candidates and independent spenders, and thus does not serve an anti-corruption interest. The rescue funds might make public financing more enticing, but cannot do so without a compelling justification for the resulting burden it places on privately funded candidates and independent spenders. The rescue funds fails strict scrutiny.

III. The Disproportionate Reporting Requirements Conflict with Decisions of This Court.

The rescue funds provision depends on unilateral, compelled disclosures of privately funded candidates and independent spenders in order to function. This alone warrants a finding of their unconstitutionality under *Davis*, which held that disclosure requirements enacted to implement unconstitutional disproportionate contribution limits could not be justified on those grounds and, as such, were unconstitutional. *Davis*, 128 S. Ct. at 2775. Moreover, since the reporting requirements create burdens triggering strict scrutiny, which they fail, the reporting provisions should also have been deemed unconstitutional.

A. The Reporting Provision Burdens Core Political Speech.

The court below contended that the reporting provision "is not particularly burdensome." App. 19a.

Since that decision, the North Carolina legislature is in the final stages of revising certain aspects of the reporting provision, requiring privately funded candidates to report contributions, rather than expenditures, and leaving the expedited reporting schedules at the discretion of the election board.[20] Despite these changes, the reporting provisions still burden core political speech.

This Court has expressly recognized that disclosure provisions can burden speech, *Davis*, 128 S. Ct. at 2774-75 (*quoting Buckley*, 424 U.S. at 64) ("'[C]ompelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.'"), because compelled disclosure undermines the privacy of private association and potentially subjects those associated with the group to harassment. *Buckley*, 424 U.S. at 64-66. Furthermore, compelled disclosure of "confidential internal materials" violates privacy rights and "seriously interferes with internal group operations and effectiveness." *AFL-CIO v. FEC*, 333 F.3d 168, 177-78 (D.C. Cir. 2003); *see also Davis*, 128 S. Ct. at 2768 (holding that plaintiff had standing to challenge a mandatory disclosure provision where he "faced the imminent threat" of having to make disclosures under the provision).

The reporting requirements here impose two distinct burdens on a privately funded candidate and an independent spender's free speech rights to privacy and effective advocacy. These burdens are unilateral, since nothing comparable is required of publicly funded candidates.

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[20] *See* Senate Bill 1263, Section 10.2(a), *supra* note 2.

First, the privately funded candidate and independent spenders are burdened by the 24-hour reporting requirements. Within 24 hours after privately funded candidates receive contributions or entities make an independent expenditure that exceeds the threshold percentage of the trigger amount, they must file a report. N.C. Gen. Stat. § 163-278.67(a). They are then subject to an expedited reporting schedule, reporting in increments of $1,000 under the current law, or at the discretion of the election board under the recent revision. *Id.* These unilateral reports are in addition to normal reporting requirements. *Id.* at § 163-278.9.

Second, the privately funded candidate and independent spenders are burdened with heightened recordkeeping and reporting not required of publicly funded candidates or independent spenders opposing privately funded candidates. The requirement to file such reports on an expedited basis can be especially problematic because, whether such reporting is at the too-low threshold of $1,000 or at the discretion of the election board, the reporting provision requires continuous, contemporaneous reporting. Staff must be hired to do this burdensome compliance, which requires a substantial amount of time, and for which there are penalties for late or missing reports. *Id.* at § 163-270.

These two distinct burdens—in addition to the more general burden of compelled disclosure itself, with the concomitant loss of privacy–trigger strict scrutiny.

B. The Reporting Provision Fails Strict Scrutiny.

In analyzing the reporting provision, the lower

court declined to apply strict scrutiny. The court believed that *Buckley* and *McConnell v. FEC*, 540 U.S. 93 (2003), did not require strict scrutiny for disclosure requirements, and that the reporting requirements had a substantial relationship to an informational interest, an anti-corruption interest, and a data-collecting interest, because the reporting requirements enabled "the effective administration of matching funds" and thus passed intermediate scrutiny. App. 19a. This is contrary to *Davis*.

The *Davis* Court expressly states that "we have closely scrutinized disclosure requirements, including requirements governing independent expenditures made to further individuals' political speech," noting that "[t]o survive this scrutiny, significant encroachments 'cannot be justified by a mere showing of some legitimate governmental interest.'" *Davis*, 128 S. Ct. at 2775 (*quoting Buckley*, 424 U.S. at 64). Because the reporting provision burdens the speech of both candidates and third parties in at least two material ways, it amounts to a "significant encroachment" on their speech rights that warrants strict scrutiny review.

Under such review, the reporting provision fails. These unilateral compelled disclosures are clearly designed to implement the rescue funds provision, which is unconstitutional, which renders the reporting provision unconstitutional. *See Davis*, 128 S. Ct. at 2775 ("The § 319(b) disclosure requirements were designed to implement the asymmetrical contribution limits provided for in § 319(a), and as discussed above, § 319(a) violates the First Amendment. In light of that holding, the burden imposed by the § 319(b) requirements cannot be justified, and it follows that they too

are unconstitutional.").

Furthermore, as the court below correctly recognized, general disclosure requirements that apply to all candidates, e.g., quarterly reports of contributions and expenditures and special pre-election reports, were approved in *Buckley* on the basis of three interests advanced by disclosure: (1) informing the electorate, (2) deterring corruption, and (3) collecting data to detect violations of contribution limits. *Buckley*, 424 U.S. at 66-68. None of these interests are applicable to support the special disproportionate reporting imposed here.

The first interest, the informational interest, is not cognizable because the required reporting is underinclusive as to that interest. *See Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) ("[T]he Court need not decide whether achieving "impartiality" (or its appearance) in the sense of openmindedness is a compelling state interest because, as a means of pursuing this interest, the announce clause is so woefully underinclusive that the Court does not believe it was adopted for that purpose."); *Fla. Star v. B.J.F.*, 491 U.S. 524, 540 (1989) (Where considerable First Amendment freedoms are at stake, a state must "demonstrate its commitment to advancing [its] interest by applying its [requirements] evenhandedly."). While the privately funded candidate and independent spenders supporting privately funded candidates must file reports within 24 hours of receiving contributions or making independent expenditures, publicly funded candidates and organizations making independent expenditures opposing privately funded candidates are not required to promptly report their spending. Indeed, independent expenditures made

opposing a privately funded candidate need not be reported at all. N.C. Gen. Stat. § 163-278.66(a). And while the privately funded candidate must file expedited reports, publicly funded candidates are only subject to normal reporting requirements. *Id.* If the North Carolina legislature had a genuine interest in providing the public with the information that these extremely prompt reporting requirements provide, the same sort of reporting would be required of all candidates and independent spenders. That North Carolina does do this undermines any claim that the interest in informing the public justifies the provision.

In any event, the public will receive full information about candidate campaign contributions and expenditures in the less-restrictive quarterly and pre-election reports that both candidates must file, *id.* at § 163-278.9, so the special, unilateral reporting requirements are redundant and unnecessary. Any asserted informational interest would be "insubstantial because voters may identify [the relevant information] under [other] provisions." *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 298-99 (1981). "It is clear, therefore, that [the challenged disclosure provision] does not advance a legitimate governmental interest significant enough to justify its infringement of First Amendment rights." *Id.* at 299.

The second interest, deterring corruption, is also not applicable to the reporting provision because, as noted above, candidate campaign and independent spending poses no risk of corruption. But the reporting provision is also underinclusive. There is nothing that suggests that those who oppose a privately funded candidate are uniquely immune from exercising

corruptive influences, but they are not subject to the special reporting requirements. This underinclusiveness undermines the court's reliance on this interest.

Finally, the third interest in collecting data to detect violations of contribution limits is not applicable because none of the data required to be reported has any application to detecting circumvention of contribution limits. With regard to candidates, this interest is adequately served by the less-restrictive quarterly and pre-election reports that both candidates must file, N.C. Gen. Stat. § 163-278.9. And requiring reports from entities based on independent expenditures, or from candidates based on contributions made out of personal funds does not advance this interest at all.

As a result, the court below erred in upholding the reporting provision and this Court should grant the writ to correct this error.

Conclusion

For the foregoing reasons, this Court should grant the writ, vacate and remand this matter to the Fourth Circuit for reconsideration in light of this Court's decision in *Davis v. FEC*, 128 S. Ct. 2759 (2008), or, in the alternative, grant the writ and decide this case on the merits.

Respectfully submitted,

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